Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-997

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT LAHODNY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

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INTRODUCTION

Petitioner has placed before this Court the relatively uncomplicated claim that his double jeopardy rights should not be denied without an evidentiary hearing to resolve disputed factual issues. Aside from determining the impact of pending decisions before this Court on this case, this Petition raises the purely legal question of whether the Ninth Circuit was correct in holding that the trial court could apply the "due diligence" exception to the double jeopardy claim without conducting an evidentiary hearing. The Ninth Circuit's refusal to require an evidentiary hearing flies in the face of this Court's plurality and dissenting decisions in *United States v. Raddatz,* 447 U.S. 667 (1980) as well as the decisions of the Ninth Circuit and other circuits, all of which require that factual disputes on pretrial motions be resolved by considering evidence and live testimony.

The simple legal issues of whether Petitioner has the right to an evidentiary hearing is obscured by the Brief for the United States in Opposition (hereinafter cited as Bf.Opp.). One source of confusion is the government's injection of the waiver issue into this appeal, Bf.Opp. at 8-9, despite the fact that the waiver question was not raised by the certiorari petition nor by the Ninth Circuit which explicitly refused to decide the waiver issue, Petition for Writ of Certiorari-Appendix at A8 (hereinafter cited as Pet.Cert.). Further confusion arises from the government's misguided treatment of the record in this case as a set of well-established facts. In fact, there is no record in any conventional sense but merely a series of in-court developments surrounded by disputed factual issues. Petitioner does not request that this court resolve those disputed factual issues; Petitioner merely requests that this Court decide the legal question of whether disputed factual issues relating to double jeopardy protections should be resolved at an evidentiary hearing as required by the opinions in *Raddatz.*

In a final attempt to needlessly complicate the issues raised by this petition, the government seems to argue that the pending decision of this Court in *Garrett v. United States,* No. 83-1842, may result in a holding that the §846 and §963 conspiracy offenses in this case are not lesser included offenses within the CCE. This argument is foreclosed by the government's concession at the trial and appellate level that the 1982 conspiracy charges to which Petitioner pled guilty are the same offense as the CCE offense. Pet.Cert. at A6. This concession was compelled by the clear dictates of *Jeffers v. United States,* 432 U.S. 137 (1977) and the facts pleaded in the two indictments which demonstrate the absence of any factual distinction between the activities charged in the two conspiracies and those charged in the CCE count. The 1982 conspiracy indictment

specifically incorporates all but two of the transactions set out in the CCE count, Appellant's Opening Brief (Ninth Circuit) at 7 n.3, and all of the activities in the two indictments were alleged to be the product of a single conspiratorial entity, *id.* at 7-8.

I.
INAPPLICABILITY OF WAIVER DOCTRINE TO THE INSTANT CASE

For reasons not immediately apparent, the government wishes to have this Court consider a waiver issue not raised by the certiorari petition or by the Ninth Circuit decision which is the subject of the petition. Bf.Opp. at 8-9. Although the district court's ruling referred to both the "due diligence" exception and the waiver doctrine, the Ninth Circuit relied exclusively on the "due diligence" exception and stated: "Accordingly we need not consider the waiver issue." Pet.Cert. at A8. The government's injection of a waiver question extraneous to the matters raised by the Petitioner and the Ninth Circuit, should not obscure the simple legal question of whether Petitioner was entitled to a hearing at which the district court would consider evidence and live testimony on disputed factual issues.

Despite Petitioner's doubts as to the materiality of the waiver issue, the government's injection of this issue into the case requires some response. A brief examination of the factual and legal difficulties in applying the waiver doctrine will demonstrate why the Ninth Circuit eschewed any reliance on that doctrine.

A. Factual Record for Waiver Issue

In denying Petitioner's double jeopardy claim, an alternative holding of the district court was that Petitioner's actions in April 1983, constituted a waiver of double jeopardy rights. To briefly recapitulate the relevant procedural developments, Petitioner had been

indicted on August 3, 1982 with conspiracy counts alleging violations of 21 U.S.C. §846 and §963. On November 2, 1982, Petitioner filed a notice of appeal from an order denying his double jeopardy motion to dismiss the conspiracy counts. On April 5, 1983, Petitioner withdrew his appeal and on April 6, pled guilty to the charges in the 1982 indictment. On August 24, 1983, the instant CCE indictment was filed. The district court concluded that Petitioner had suddenly withdrawn his appeal with the intent to avoid a CCE indictment and that by making this tactical decision, Petitioner gave up his right to have the CCE offense and the 1982 conspiracy charges tried together. Appellant's Excerpt of Record (Ninth Circuit) at 365 (hereinafter cited as E.R.).

Even this simple skeletal framework is replete with ambiguities and disputed factual issues which should have been resolved at an evidentiary hearing. The most significant disputed factual issue was the intent element of the wiaver doctrine which requires a "voluntary knowing relinquishment of a right." *Green v. United States,* 355 U.S. 184, 191 (1957). Although intent issues are generally so inherently factual in nature as to require live testimony, *see Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962); *Central Natl. Life Ins. v. F. & D. Co. of Md.,* 626 F.2d 537, 540 n.6 (7th Cir. 1980), the district court found that Petitioner entertained the requisite intent for waiver without hearing any live testimony by Petitioner or anyone else. In reality, the district court's holding on waiver was not based on any evidence of intent but was based on an impermissible inference of waiver from a silent record, *see Boykin v. Alabama,* 395 U.S. 238, 243 (1969).

Another factual issue requiring live testimony arose from Petitioner's action (or inaction) at proceedings on April 6, 1983. At those proceedings, the prosecutor

requested a continuance of the guilty plea. Petitioner had no response to this request other than to state, through counsel, that he was present to plead guilty. E.R. at 91-96. Despite the absence of any objection or argument by Petitioner opposing the continuance, the district court denied the prosecution's continuance request.[1] Again from a silent record involving no affirmative act by Petitioner but only at best a failure to act, the district court drew an impermissible inference of waiver. *See United States v. Brown*, 188 F.Supp. 624, 625 (S.D.N.Y. 1960). However, it is not this Court's role to pass judgment on the merits of this inference but to insist that this inference be based on live testimony rather than a nonexistent record.

B. Inapplicability of Waiver Under this Court's Decisions

The difficulties in applying waiver to this case multiply geometrically when analyzed in the light of this Court's decisions in *Jeffers v. United States,* 432 U.S. 137 (1977) and *Sanabria v. United States,* 437 U.S. 54 (1978). In *Jeffers,* the plurality held that by opposing a prosecution motion to consolidate separate §846 and §848 indictments, the defendant waived any double jeopardy objection to the §848 indictment following conviction on the lesser included §846 offense. The language of the plurality opinion[2] specifically indicates that waiver cannot be applied where the prosecution bears *any* responsibility for the multiple indictment situation:

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[1]It is noteworthy that the government's brief before this court refrains from any assertion that Petitioner explicitly opposed the continuance request. Bf.Opp. at 3.

[2]Because the plurality opinion in *Jeffers* was adopted by only four justices, the equal split among the justices on the waiver issue has created doubt in the lower courts as to the validity of the *Jeffers* waiver theory. *United States v. Kalish,* 690 F.2d 1144, 1153 n.8 (5th Cir. 1982).

> The considerations relating to the propriety of a second trial obviously would be much different *if any action by the Government contributed to the separate prosecutions* on the lesser and greater charges. No hint of that is present in the case before us, since the Government affirmatively sought trial on the two indictments together. [emphasis added]

Jeffers v. United States, supra, 432 U.S. at 153 n.20. *See also id.* at 155 (noting that defendant was "solely responsible" for the multiple prosecutions).

In complete disregard of the precise language of *Jeffers,* the district court applied the waiver doctrine by balancing the relative "fault" of the parties rather than determining whether the prosecution bore some responsibility for the multiple indictment situation. E.R. at 359-60. Moreover, this erroneous standard was applied without the benefit of live testimony to resolve conflicting factual contentions that shed light on the issue of "fault."[3]

An equally important error in the district court's ruling was the failure to acknowledge the fundamentally different procedural postures of *Jeffers* and this case. *Jeffers* involved a defendant's objection to consolidation of an existing §846 charge with an existing CCE charge. In the instant case, there was no CCE charge in existence which could have been consolidated when Petitioner pled guilty on April 6, 1983. Petitioner had been waiting since November 1981 for the CCE charge to be filed and the government acknowledged and the court found that after October 1982 the prosecution had all of the evidence necessary to convict. It was not just a matter of waiting a few days; the CCE indictment was not filed within

[3] *Cf. Mitchell v. W.T. Grant, Co.,* 416 U.S. 600 (1974) (due process required full hearing when state garnishment statute requires a showing of "fault" on the debtor's part).

5 days, or 30 days or even 90 days of this April guilty plea. The fallacy of the lower court's waiver theory was that not only was Petitioner expected to delay his guilty plea to permit consolidation with a CCE charge that did not exist but that he would have to delay the plea until August 24, 1983, more than four and a half months after the April 6, 1983 guilty plea.[4]

The district court also disregarded this Court's decision in *Sanabria v. United States*, 437 U.S. 54 (1978) in which the *Jeffers* waiver theory was limited to cases where the defendant secures separate trials of the lesser and greater offenses by claiming that they are distinct offenses and specifically electing separate trials.[5] *Id.* at 77-78. In the instant case, *Sanabria* precluded a waiver finding because Petitioner never argued that the CCE offense was distinct from the lesser included conspiracy offenses nor for separate trials.

II.
PREDOMINANCE OF FACTUAL DISPUTES REQUIRING AN EVIDENTIARY HEARING

One disturbing aspect of the Brief of the United States in Opposition is that it treats this case as if it had a factual record derived from a meaningful adversary

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[4]In this case, the district court's waiver decision was fundamentally illogical because it found a waiver of double jeopardy rights on April 6, 1983 even though no double jeopardy right existed on that date. There was no CCE charge in existence at the time of the April 6 plea and in the absence of multiple indictments, no double jeopardy claim could exist. *See generally, Albernaz v. United States,* 450 U.S. 333, 334-45 (1981). Petitioner was in no position to assert any double jeopardy right on April 6, 1983; that right would not exist until four months later when the CCE indictment was filed.

[5]In *Sanabria,* this Court rejected the government's argument that the defendant waived the right to avoid a separate trial for a "numbers" theory of liability for a violation of 18 U.S.C. §1955 liability. *Sanabria* held that *Jeffers* was inapplicable because the defendant had not claimed that the horse betting and numbers

hearing. The government discusses numerous matters as if they were established facts even though Petitioner was given no opportunity to present exhibits or live testimony or cross-examine prosecution declarants. Indeed, the only undisputed facts relate to in-court developments and virtually all other facts, including those relating to the parties' intent, motives, diligence in investigating the case or responsibility for separate prosecutions, are disputed by the parties.

As discussed in the certiorari petition, the district court's refusal to consider evidence including live testimony on disputed factual issues cannot be reconciled with the views of this Court as expressed in the plurality and dissenting opinions in *United States v. Raddatz*, 447 U.S. 667 (1980), Pet. Cert. at 13. All of the opinions in *Raddatz* indicate that live testimony on factually disputed pretrial motions should be considered at some point in the litigation process. *Id.* at 14 n.9. In the context of double jeopardy motions, the right to an evidentiary hearing on disputed factual issues has been acknowledged by the Ninth Circuit and other circuit courts. *Id.* at 14-15; *United States v. Flick*, 716 F.2d 735, 739 (9th Cir. 1983);[6] *United States v. Beachner Construction Co.*,

theories of liability were distinct offenses and therefore had not argued for separate trials. *Id.* at 77-78. Further, the Court noted that the defendant does not waive his double jeopardy protection whenever his motion produces a trial court error in his favor. *Id.* at 79.

[6]*Flick* remanded to the district court because the record was inadequate to determine whether two conspiracy indictments charges the same offense. The court commented that the record was "extremely sparse" in part because "[m]uch of the information before us regarding critical factual issues comes from the conflicting representations of counsel at oral argument," *United States v. Flick, supra*, 716 F.2d at 739. The court then remanded the case to the district court with the suggestion that "[t]he district court should consider the appropriateness of holding an evidentiary hearing in order to resolve any disputed facts material to resolution of those claims." *Id.*

Inc., 729 F.2d 1278, 1283 & n.10 (10th Cir. 1984).[7]

Nothing in *Raddatz* or any of the double jeopardy cases indicates that a district court can subjectively decide that it is "intimately familiar" with the case and set aside its obligation to consider live testimony on disputed factual issues. Neither the Ninth Circuit decision in this case nor the government's brief cite any authority to support the "intimate familiarity" exception to the double jeopardy and due process rights of the accused, the theory adopted by the Ninth Circuit in this case, Pet.Cert. at A7. The erroneous concoction of this unprecedented "intimate familiarity" exception is compounded by the Ninth Circuit's application of a "clearly erroneous" standard of appellate review for factual findings reached without considering live testimony.[8]

Even if some nebulous "intimate familiarity" exception existed, this case would be a particularly inappropriate application of that exception since most of the disputed factual issues took place outside of the court's presence. Contrary to the impression created by the government, the district court did not take evidence on the motion, Bf.Opp. at 4, but spent much of its time refusing to take evidence under the patently erroneous assumption that Petitioner and the prosecution concurred on the facts.[9] At both the trial and appellate level, Petitioner

[7]The instant case is fundamentally different from the Ninth Circuit "due diligence" decision in *United States v. Stearns*, 707 F.2d 391 (9th Cir. 1983) in that an evidentiary hearing was held in *Stearns* and the appellant courts were asked to decide the factual merits of the case. In the instant case, this Court is being asked to decide the purely legal question of whether Petitioner was entitled to an evidentiary hearing and the factual merits are not at issue.

[8]Contrary to the government's suggestion, Bf. at 9-10, the Ninth Circuit did not affirm the trial court's finding that there were not disputed facts but excused the lack of an evidentiary hearing under the "intimate familiarity" theory.

[9]The district court reached a finding that there was insufficient evidence of a CCE until November 1982, *id.*, a finding made while

has specified factual conflicts pertaining to the due diligence issue, Pet. Cert. at 11 n.7[10] and the waiver issue. In a case replete with these factual disputes, there is no sound policy justification for relying on a court's subjective feeling of intimate familiarity with a case as a substitute for the long-established judicial procedure of holding evidentiary hearings to resolve factual disputes.

CONCLUSION

Petitioner does not request that this Court resolve the merits of the many factual disputes in this case. The certiorari petition merely seeks this Court's vindication of his right to adequately present his double jeopardy case in the lower courts on the disputed factual issues. Without the opportunity to present documentary evidence, live testimony and cross-examine government witnesses, Petitioner will never have anything resembling his "day in court."

Respectfully submitted,

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refusing to consider any live testimony to establish what evidence the prosecution had and what investigative steps were taken to secure evidence. The district court also found that the government's delay were reasonable and responsible without conducting an evidentiary hearing to determine what motivated those delays. While the government contends that it delayed filing the CCE charge from November 1982 to April, 1983 because it feared that the interlocutory appeal would affect the CCE charge, Petitioner contended that this was not the government's actual motive for delay and was never able to present physical evidence and live testimony on this issue.

[10]For example, in conflict with the district court's finding that the prosecution had insufficient evidence of a CCE offense before November 1982, Petitioner refused to stipulate to that fact and repeatedly offered to show that the prosecution had sufficient evidence within the first few months of 1982. *Id.* Petitioner also disputed the finding as to the date of the Justice Department's oral approval of the CCE prosecution. *Id.*

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 8, 1985, I served the within *Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 8, 1985, at Los Angeles, California.

Robin J. McColgan
Original signed)